United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 27, 2005

TO : Wayne Gold, Regional Director
Region 5

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Baltimore Sun
Case 5-CA-32186

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The Region submitted this case for advice on whether the Employer violated Section 8(a)(1), (3), and (5) of the Act by unilaterally implementing an ethics code after the parties failed to reach agreement on the terms for such a code during a limited, agreed-on negotiation period.

We conclude that the Region should dismiss the charge in this case, absent withdrawal. First, we conclude that the Employer did not violate Section 8(a)(5) because the Union waived its right to bargain to impasse over the terms of an ethics code. Second, we conclude that the provisions of the ethics code did not amount to unlawful work rules that violate Section 8(a)(1). Finally, we conclude that the evidence does not support the Union's assertion that the Employer's conduct violates Section 8(a)(5) under the principles set forth in McClatchy Newspapers.[1]

FACTS

The Baltimore Sun ("the Employer") is engaged in the business of publishing newspapers. Since 1949, the Washington-Baltimore Newspaper Guild ("the Union") has represented the employees in the Employer's news, editorial, and commercial departments.[2]

From August 2001 to April 2002, the parties bargained over the terms of an ethics code that the Employer had proposed for news department employees. Although the parties did not reach an agreement on the code, the Employer

[1] 321 NLRB 1386, 1391 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998).

[2] The Union is affiliated with the Communication Workers of America.

announced its intent to implement the code. The Union first filed an unfair labor practice charge,[3] but then withdrew that charge when the Employer agreed in a non-Board settlement to not implement a code at that time.

In 2003, the parties negotiated their current collective bargaining agreement, which has a term of June 2003 to June 2007. During those negotiations, the parties exchanged numerous proposals regarding the terms of an ethics code. Unable to reach agreement on a code, the parties executed Letter of Understanding #6, which is attached to the 2003-2007 contract, wherein they agreed that:

> The [Employer] reserves the right to institute and develop an ethics code during the term of the collective bargaining agreement. The [Employer] will give the [Union] notice and opportunity to bargain over the terms of the ethics code prior to implementation.
>
> Upon the [Union's] request, the parties agree to bargain in good faith for eight (8) weeks from the date of notice to the [Union]. If, following such a request from the [Union], the [Employer] is unable to schedule any bargaining during a particular week within the relevant eight-week period, the bargaining period will be extended by an equal number of weeks.
>
> In the event the parties are unable to reach agreement over the terms of the ethics code within the time period defined by this Letter of Understanding, the [Employer] may implement an ethics code consistent with its last offer to the [Union].
>
> If there is a conflict between the terms of the ethics code and Section 20.1, Outside Activity, of the Agreement, the ethics code will prevail.[4]

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[3] Case 5-CA-30640.

[4] Section 20.1 of that agreement, entitled "Outside Activity" states: "Employees shall be free to engage in any activities outside their working hours which do not constitute service for any interest or publication in competition with the [Employer]. No employee, without permission of the [Employer], shall use in the course of such activities any material or featured title of the [Employer] or exploit in any way the employee's connection with the [Employer]. In the event of a conflict between the

In late July 2004, the Employer notified the Union that it intended to develop an ethics code covering unit employees. The parties met and exchanged proposals on several dates from late July through September 2004. During negotiations, Union officials asked about proposed terms requiring unit employees to disclose in advance to the Employer their outside, non-working time activities, including those protected by Section 7. Unit Chair Michael Hill and Local Representative Cet Parks state that Employer Human Resources Manager Dale Cohen explained that, for example, all news and editorial department employees would have to obtain management permission before participating in a demonstration at another employer's location.

The Union sought exceptions for Section 7 activity and the Employer agreed to add some disclaimer language. However, the parties failed to reach agreement on the code by the end of the eight-week bargaining period set forth in Letter of Understanding #6. On September 27, 2004, the Employer implemented its final ethics code proposal, which contains four parts. The first part, entitled "Introduction," states that the code is intended

> to address the [Employer's] legitimate business goal of safeguarding the integrity, credibility, and impartiality of the [Employer], its publications and its employees. The Code shall not interfere with the rights of employees to engage in activities protected by Section 7 of [the Act] unless it is necessary to protect the integrity, credibility, or impartiality of the [Employer], its publications, or its employees.

The Employer also reserved the right to unilaterally change or modify the code, "in accordance with applicable legal requirements."

The second part lists the code's general provisions and is applicable to all unit employees and, in some instances, their families. In general, it deals with subjects such as improper payments, conflicts of interest, confidentiality, and the protection and proper use of company assets. Unit employees are instructed to first disclose their potential activities to management and obtain prior approval if they are uncertain whether their actions will create the appearance of bias.

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terms of an ethics code and this Section 20.1, the ethics code shall prevail."

The third part of the code applies only to newsroom and editorial department employees. It covers many of the same topics as section two, such as conflicts of interest and confidentiality, but imposes stricter requirements. It also includes, among other things, rules on the types of outside activities in which unit employees, and in some instances their families and friends, may engage. This part of the code also contains the general dictate that, when unsure whether their activities will create the appearance of bias, employees should discuss the matter with management first and obtain prior approval.

The final part deals with compliance and requires employees to fill out Appendix A of the code, which contains two forms the unit employees must complete. The first form applies to all unit employees and requires disclosure of noncompliance with the code, such as existing conflicts of interest from other employment or involvement in other businesses. The second form applies only to newsroom and editorial department employees and requires disclosure of all activities that may give rise to actual or apparent conflicts of interest.

The Union has submitted evidence that the code has had some impact on the unit employees' non-work activities. For example, one employee and his spouse agreed to omit his name from a political contribution because of concerns about violating the new ethics code. Another employee failed to renew her memberships with the Sierra Club and the ACLU because of concerns about violating the new code. The Union has not submitted any evidence that the new code has restricted Section 7 activities by employees or that the Employer has applied the code to discriminate against Section 7 activities.

ACTION

We conclude that the Region should dismiss the current charge, absent withdrawal. First, we conclude that the Employer did not violate Section 8(a)(5) by implementing the code absent Union agreement during negotiations because the Union clearly and unmistakably waived its right to bargain to impasse over the terms of an ethics code. Second, we conclude that the provisions of the ethics code did not amount to unlawful work rules that violate Section 8(a)(1) because they either would not reasonably tend to chill the exercise of Section 7 rights or accommodate a legitimate and substantial business justification. Finally, we conclude that the Employer did not violate Section 8(a)(5) under the principles set forth in McClatchy Newspapers because the

evidence does not show that the Employer retained unfettered discretion to change or modify the ethics code.[5]

I. THE UNION CLEARLY AND UNMISTAKABLY WAIVED ITS RIGHT TO BARGAIN TO IMPASSE OVER THE TERMS OF AN ETHICS CODE.

Clear and unmistakable language must be present to find that a party has contractually waived its right to bargain over a specific subject.[6] In Ingham Regional Medical Center, the Board affirmed an ALJ who held that the union had clearly and unmistakably waived its right to bargain over the subcontracting of unit work based on the language of the management rights and subcontracting clauses in the parties' contract.[7] The subcontracting clause there stated that the "employer reserves the right to . . . subcontract work normally performed by bargaining unit employees."[8] Although the clause also imposed a 60-day "discussion" period on the parties before subcontracting could occur, that provision was interpreted as establishing a "procedure to enable the employer to gain the benefit of the union's ideas," and not as requiring the parties to negotiate to impasse.[9] Because the employer had complied with the terms of the clause, the Board held that it did not violate Section 8(a)(5) when it unilaterally subcontracted unit work.[10]

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[5] We also agree with the Region that there is no basis for a Section 8(a)(3) violation here because no unit employees have been disciplined pursuant to the new ethics code. Thus, the Region should also dismiss that aspect of the charge, absent withdrawal. The remainder of this memorandum addresses only the Section 8(a)(1) and (5) aspects of the charge.

[6] See, e.g., Allison Corp., 330 NLRB 1363, 1365 (2000).

[7] 342 NLRB No. 129, slip op. at 4 (September 24, 2004).

[8] Id., slip op. at 2.

[9] Id., slip op. at 4.

[10] See also Allison Corp., 330 NLRB at 1365 (management rights clause contained clear and unmistakable waiver of union's right to bargain over subcontracting); Mary Thompson Hosp., 296 NLRB 1245, 1249 (1989) (union clearly and unmistakably waived right to bargain over termination of pension plan where parties' contract incorporated terms of pension plan, including provision allowing employer to

The present case is similar to Ingham Regional Medical Center. Here, Letter of Understanding #6 was a clear and unmistakable waiver of the Union's right to bargain to impasse over the terms of an ethics code. The letter makes clear that, absent agreement on an ethics code after eight weeks of bargaining, the Employer could unilaterally implement its final offer.[11] It is undisputed that the Employer complied with its bargaining obligation as set forth in the letter and that the parties failed to reach agreement on the terms of an ethics code during the eight-week period. Accordingly, the Employer did not violate Section 8(a)(5) when it unilaterally implemented its final offer.[12]

We also conclude that the ethics code implemented pursuant to the Union's waiver did not interfere with "rights that impair the employees' choice of their bargaining representative," which the Union could not waive.[13] It is asserted that employees may construe the code's "confidentiality" provision (Part II, § 7) as impairing their ability to choose their bargaining representative because they could not discuss their terms and conditions of employment with persons other than coworkers or the Union. However, this provision's disclaimer, although it only explicitly permits discussions

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unilaterally discontinue plan), enfd. 943 F.2d 741 (7th Cir. 1991).

[11] The letter also made clear that the unilaterally implemented code would trump Section 20.1, "Outside Activity," of the parties' contract. Thus, there is no merit to the Union's argument that the Employer engaged in an unlawful mid-term modification of the contract.

[12] Because we conclude that the Union clearly and unmistakably waived its right to bargain to impasse over an ethics code, it is not necessary to analyze whether the Employer was privileged to unilaterally implement the code based on the test set forth in Peerless Publications, Inc., 283 NLRB 334, 335 (1987).

[13] Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705-706 (1983) (citing NLRB v. Magnavox Co. of Tenn., 415 U.S. 322, 325 (1974)). See also Lana Blackwell Trucking, LLC, 342 NLRB No. 110, slip op. at 1, n.1 (September 15, 2004), where the Board held that a union cannot waive an employee's core Section 7 right of being treated in a nondiscriminatory manner.

of terms and conditions of employment with coworkers and the Union, makes clear to employees that Section 7 activities are privileged. The Employer included this and other disclaimers in the code to address the Union's concerns, which were raised during negotiations, about the code interfering with employee Section 7 rights. In view of these disclaimers, employees would not reasonably conclude that they are prohibited from discussing their terms and conditions of employment with another labor organization.[14]

We also conclude that there is no evidence that the Employer bargained in bad faith so as to preclude the Union's waiver in Letter of Understanding #6 from becoming effective. Assuming the Employer's proposals during bargaining for the ethics code could be characterized as "intrusive" or "overbroad," there is no evidence the Employer failed to offer a justification for its position, or displayed an unwillingness to make concessions.[15] Moreover, any reliance on Meda-Care Ambulance, Inc.[16] to argue that the Employer bargained in bad faith is misplaced. In that case, the employer refused to bargain until the union agreed to a loyalty clause, i.e., a permissive subject of bargaining. As stated above, there is no evidence of such insistence here. Also, the loyalty clause in this case (Part II, § 6), when read in context, merely prevents employees from usurping a corporate opportunity and does not require the employees or their representatives to pledge

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[14] The Board's decision in Universal Fuels, Inc., 298 NLRB 254 (1990), is distinguishable. There, the Board first held that rules in the parties' labor contract, which prohibited "misrepresentation in connection with any employee benefit . . . [or] any claim concerning his employment or his pay," were unlawfully overbroad because they could interfere with protected communications. Id. at 255-256. The Board then rejected the employer's defense that the rules were lawful because they were in the parties' labor contract. It held that the rules represented an invalid waiver of rights by the union because they could inhibit employees' opposition to the incumbent union and the terms it had negotiated. Id. at 256. Unlike that case, there is no invalid waiver of rights here because the confidentiality provision would not reasonably restrain employees from discussing terms and conditions of employment with other labor organizations.

[15] See generally Artiste Permanent Wave Co., 172 NLRB 1922, 1924-25 (1968) (citing NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958)).

[16] 285 NLRB 471, 472 (1987).

allegiance to the Employer on all matters, as was the case in Meda-Care Ambulance.[17]

II. THE PROVISIONS OF THE ETHICS CODE DO NOT VIOLATE SECTION 8(a)(1).

Although we conclude that the Union waived its right to bargain to impasse over an ethics code in Letter of Understanding #6, it did not waive any of the employees' Section 7 rights.[18] Accordingly, if the provisions of the ethics code "would reasonably tend to chill employees in the exercise of their Section 7 rights," the Employer would violate Section 8(a)(1).[19] "In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights."[20] Moreover, even if a rule could chill the exercise of Section 7 rights, it is lawful if the employer can demonstrate a legitimate and substantial business justification for the rule.[21]

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[17] Cf. Tradesman International, 338 NLRB 460, 461-462 (2002) (rule requiring employees to represent employer in "positive and ethical manner" in context of prohibition on conflicts of interest would not prohibit Section 7 activity).

[18] Cf., e.g., Allied-Signal, Inc., 307 NLRB 752, 753-754 (1992) (employer unlawfully dealt directly with employees because although union waived right to bargain over change in smoking policy, it did not waive right to exclusively represent employees).

[19] Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). See also Lutheran Heritage Village-Livonia, 343 NLRB No. 75, slip op. at 1-2 (November 19, 2004), where the Board set forth the legal framework by which the lawfulness of work rules are to be assessed. Pursuant to that framework, we note that there is no evidence here that the Employer implemented the ethics code in response to union activity or has applied it to restrict Section 7 rights.

[20] Lutheran Heritage Village-Livonia, 343 NLRB No. 75, slip op. at 1.

[21] Cf. ANG Newspapers, 343 NLRB No. 69, slip op. at 2 (November 9, 2004).

Here, the Union asserts that the code provisions listed below are unlawful.[22] We conclude that the challenged provisions, when given a reasonable reading, read in context, and considered in light of the Employer's legitimate and substantial business justification, do not violate Section 8(a)(1).

- (Part I, ¶ 4) "The Code shall not interfere with the rights of employees to engage in activities protected by Section 7 of the [NLRA] unless it is necessary to protect the integrity, credibility, or impartiality of the Publisher, its publications, or its employees."

The Union asserts that the entire code violates Section 8(a)(1) because this introductory language, which assumes that Section 7 rights will be trumped in certain situations, "explicitly restricts activities protected by Section 7."[23] To the contrary, a literal reading of this language merely clarifies that unit employees will not be prevented from engaging in Section 7 activities unless, for example, their work assignments actually create a conflict of interest that would undermine the Employer's credibility. In that situation, the Employer has a legitimate and substantial business justification, i.e., the editorial integrity of its newspaper, for infringing on Section 7 rights.[24] Thus, this language does not render the

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[22] The list of challenged provisions was gathered from statements in the Union's December 22, 2004 position statement (page 10) and its February 17, 2005 position statement (pages 7-8, 16-17).

[23] Lutheran Heritage Village-Livonia, 343 NLRB No. 75, slip op. at 1.

[24] Cf. ANG Newspapers, 343 NLRB No. 69, slip op. at 2 (dismissing 8(a)(1) complaint where newspaper-employer told reporter he had created conflict of interest by appearing before city council on union's behalf and then wrote article quoting officials who report to city council; employer had legitimate and substantial business justification against appearance of conflict of interest because "editorial integrity" is to a "newspaper or magazine what machinery is to a manufacturer"); Flamingo Hilton-Laughlin, 330 NLRB 287, 287, 294 (1994) (rule requiring employees to maintain "satisfactory attitude" was lawful because, among other reasons, "[t]here can be no doubt that an employer in the

ethics code unlawful because it would not reasonably tend to chill Section 7 activities beyond what the Employer has a legitimate business interest in limiting.

- (Part II, § 6 – Corporate Opportunities) "Employees owe a duty to the Company to advance its legitimate interests when the opportunity to do so arises."

As briefly discussed above, this clause, contrary to the Union's assertions, does not require unit employees to pledge allegiance to the Employer, but merely prevents employees from personally capitalizing on the use of the Employer's property and/or information. Thus, when read in context, the clause merely prevents employees from usurping a corporate opportunity and would not reasonably tend to chill Section 7 activities.[25]

- (Part II, § 7 – Confidentiality) "Employees must maintain the confidentiality of confidential information entrusted to them by the Company. . . . Confidential information includes all non-public information that might be of use to competitors, or harmful to the Company or its customers, if disclosed. . . . This provision does not preclude discussion of wages and working conditions among employees or with the Guild pursuant to Section 7 of the [NLRA]."

- (Part II, § 8 – Protection and Proper Use of Company Assets) "The obligation of employees to protect the Company's assets includes its proprietary information. Proprietary information includes . . . business, . . . salary information and any unpublished financial data and reports. Unauthorized use or distribution of this information would violate Company policy. . . . This provision does not preclude discussion of wages and working conditions among employees or with the Guild pursuant to Section 7 of the [NLRA]."

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service industry may require that employees maintain a satisfactory attitude").

[25] See, e.g., Tradesmen International, 338 NLRB at 461-462; Lafayette Park Hotel, 326 NLRB at 825.

- (Part III, § 1.C. – Confidentiality) "If a staff member learns something sensitive and confidential in the course of his or her job – whether it's information from a source or unpublished material from a colleague – they should not tell anyone outside of *The Sun*, except to the extent they are required to do so by law."

The Union asserts that these rules would unlawfully interfere with Section 7 rights because they would reasonably be construed by employees to prohibit discussions of their terms and conditions of employment. However, the disclaimers at the end of the first two rules remove any ambiguity and make it clear that unit employees are not prohibited from engaging in Section 7 activities.[26] Thus, these rules are distinguishable from similar rules found unlawful in other cases, but which did not contain such a disclaimer.[27] As to the third rule above, it would

[26] The Union relies on Ingram Book Co., 315 NLRB 515 (1994), to argue that the disclaimer does not salvage an otherwise unlawful rule. The employer in that case maintained an overbroad no-distribution policy with a disclaimer that stated "[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law." Id. at 516. The ALJ, who was affirmed by the Board, held that the disclaimer was inadequate to save the rule because employees do not know if a rule violates a law unless informed by their employer. Id. at 516 & n.2. The current case, however, is distinguishable because it presents the exact opposite situation. Through the disclaimer, the Employer affirmatively informed the unit employees that the first two rules above do not prevent them from engaging in Section 7 activities.

[27] Cf., e.g., University Medical Center, 335 NLRB 1318, 1322 (2001) (violation where rule prohibited "release or disclosure of confidential information concerning patients or employees"), enf. denied 335 F.3d 1079 (D.C. Cir. 2003); Flamingo Hilton-Laughlin, 330 NLRB at 287-288 & n.3, 292 (violation where rule stated "employees will not reveal confidential information regarding our customers, fellow employees, or Hotel business").

not reasonably tend to chill Section 7 activities because only a strained reading of its terms would lead employees to conclude that they were prohibited from discussing their terms and conditions of employment.[28]

- (Part II, § 12 – Compliance Procedures) "Discuss the problem with your supervisor. This is the basic guidance for all situations. . . . Always ask first, act later: If you are unsure of what to do in any situation, seek guidance before you act."

The Union asserts that employees would be chilled from engaging in Section 7 activities by the requirement to disclose in advance certain nonworking-time activities. However, the code does not require unit employees to disclose all of their Section 7 activities, but only those they believe create an actual or potential conflict of interest because of their work assignments.[29] As stated earlier, the Employer has a legitimate business justification for preventing the coverage of news by reporters with actual or apparent conflicts of interest.[30]

- (Part III, § 1 – Conflicts of Interest) "Staff members are obliged to make certain that no outside personal, ideological or financial interests conflict with their professional performance of

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[28] See, e.g., Lafayette Park Hotel, 326 NLRB at 826 (no violation where confidentiality rule did not explicitly preclude discussion of wages and employees would reasonably construe rule as applying only to confidential business information); Ark Las Vegas Restaurant Corp., 335 NLRB 1284, 1284 n.2, 1290-91 (2001), enfd. 334 F.3d 99 (D.C. Cir. 2003).

[29] The Employer made a single statement in negotiations that newsroom and editorial department employees might have to obtain management permission before participating in a demonstration at another employer's location, even if the employees were not reporting on the other employer. However, the Employer has not applied the code in that way, and the rule as finally written is not facially unlawful.

[30] See generally ANG Newspapers, 343 NLRB No. 69, slip op. at 2.

> duties or raise doubts about *The Sun's* integrity, credibility, and impartiality. Additionally, staff members should avoid activity that could create the appearance of a conflict of interest. In this and all other areas, the rule always should be that a supervising editor must be consulted if there are doubts about the appropriateness of an affiliation, a practice or a course of action. This consultation should take place before the actual or apparent conflict of interest may occur."

The Union asserts that this provision creates an ambiguous restriction on Section 7 rights by prohibiting employee conduct that "could" give the "appearance" of a conflict of interest, rather than prohibiting only conduct that actually creates a conflict of interest.[31] However, the Employer has a legitimate and substantial business justification in avoiding even the appearance of a conflict, and the rule is otherwise tailored to protect the Employer's interest in editorial integrity without unnecessarily interfering with Section 7 rights.[32]

- (Part III, § 1.H. - Outside Activity) "The newspaper's reporting must always be objective and detached. . . . Therefore, this Code requires disclosure to supervisors of any ongoing or proposed activities, relationships, dealings, or investments that could damage the integrity, credibility or impartiality of *The Sun* or conflict with its interests. The Code further requires approval of those activities. Keep in mind that *The Sun* reserves the right to withdraw its prior approval for any outside activity when circumstances change."

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[31] The Union also asserts that this provision requires employees to first disclose to management any activities in which they may engage so as to obtain management approval. We have previously addressed and rejected this concern.

[32] See generally ANG Newspapers, 343 NLRB No. 69, slip op. at 2.

- (Part III, § 1.H.(1) – Civic and Political Activity) "No staff member should contribute money to, or raise money for, any political candidate or election cause. . . . Staff members should also avoid active involvement in partisan causes – politics, community affairs, social action demonstrations – that could compromise or could seem to compromise the paper's ability to report and edit fairly. . . . While *The Sun* does not wish to interfere in the private lives of its staff members' family and friends, there may be circumstances in which a staff member's beat, assignment or job may be restricted or changed to avoid concerns that may arise as a result of such a conflict."

The Union asserts that these two provisions restrict the types of activities unit employees may engage in, including Section 7 activities. The Union also argues that the civic and political activity rule is over broad because it applies to the employees' families and friends. However, a reasonable reading of these provisions reveals that they merely require employees and their families to avoid activities that could give rise to conflicts of interest with work assignments, or require employees to alter their work assignments so as to avoid a conflict of interest.[33]

- (Part III, § 1.H.(2) - Memberships) "Staff members are not permitted to hold positions as officers, director[s], trustees or any similar posts in organizations with political and/or lobbying agendas. . . . [S]taff members may not join organizations with political and/or lobbying agendas that impact their area(s) o[f] journalistic responsibility directly or indirectly . . . without approval in advance by the Editor, Managing Editor or Editorial Page Editor. . . . Nothing in this section should be construed to restrict any staff

[33] The Union presented evidence that two unit employees have refrained from political or civic activities because of their concern with violating the new ethics code. However, there is no evidence that these employees have refrained from engaging in Section 7 activates that did not create an actual conflict of interest with their work assignments.

> member's right to join a union or to hold a position as an officer or any similar post in a union."

The Union asserts that this provision interferes with Section 7 rights by preventing employees from holding positions with organizations, other than unions, that have lobbying agendas that address workers' rights. Although the disclaimer is not a broad one, it is sufficient to inform a reasonable employee that this rule does not seek to prohibit employee Section 7 activities.

III. THE TERMS OF THE ETHICS CODE DO NOT VIOLATE THE ACT UNDER THE PRINCIPLES SET FORTH IN *McCLATCHY NEWSPAPERS*.

An employer violates Section 8(a)(5) if, after impasse, it implements a proposal governing a key term or condition of employment that grants it complete discretion, without governing criteria, to make unilateral changes in that term over the course of the parties' labor contract.[34] The rationale is that unilateral action by an employer over a key term would irreparably undermine the collective bargaining process because it demonstrates to employees that their exclusive bargaining representative has no role in setting such terms.[35] Thus, for example, in McClatchy Newspapers, the employer violated Section 8(a)(5) by unilaterally implementing after impasse a proposal in which it reserved sole discretion on merit wage increases, including the timing, amount, and criteria for granting the increases.[36]

We conclude that the concerns in McClatchy Newspapers are not present in this case. The evidence does not support the Union's assertion that the Employer has retained unfettered discretion to unilaterally change the terms of the ethics code. The code states that the

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[34] See, e.g., McClatchy Newspapers, Inc., 321 NLRB at 1391 (involving merit wage increases); KSM Industries, Inc., 336 NLRB 133, 135 & n.6 (2001) (involving health insurance).

[35] See, e.g., McClatchy Newspapers, Inc., 321 NLRB at 1391; KSM Industries, Inc., 336 NLRB at 135.

[36] See McClatchy Newspapers, Inc., 321 NLRB at 1387.

Employer reserves the right to make modifications or changes, but only "in accordance with legal requirements" (Part I, ¶ 5). This ensures that the Union will have a role to play regarding post-implementation changes to the code.[37] Thus, because the Employer has not retained sole, unfettered discretion to makes changes to the code, it did not violate Section 8(a)(5) under the principles set forth in McClatchy Newspapers.[38]

[37] The first page of Appendix A to the code is a form that all unit employees must complete in which they disclose, among other things, their conflicts of interest. At the bottom of the form, there is a statement that "[t]he publisher reserves the right to add to, delete from, modify, and/or alter this proposal at any time." We conclude that this language, which does not have the qualifying clause of the provision stated above, applies only to the appendix and not the terms of the code. Thus, it would not privilege the Employer to unilaterally change the terms of the code.

[38] For these reasons, we also find no merit to the Union's argument that Part I, ¶ 5 and all of Part III of the ethics code violate Section 8(a)(1).

For all of the reasons set forth above, the Region should dismiss the charge, absent withdrawal.

B.J.K.